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Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

November 2012

Holiday Season Board Schedule

Please see the attached Notice to the Community.

Scope Notes

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in October of this year. These decisions will appear in the September/October issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute at www.canlii.org.

Certification – Construction industry – Employer – One issue before the Board was whether four individuals were employees of the responding party – The Board reviewed the *York Condominium* "true employer" factors, and found that the SCC's more comprehensive test, with its non-exhaustive list, set out in *Pointe-Claire (City)* better enabled the Board to determine which party exercises the most control over all aspects of the work of the employees in question – The Board found the individuals were integrated more thoroughly into the operations of B.M. Metals than AMI, and that although a third connected business assigned some specific work to these individuals, B.M. Metals hired them to service a contract with Vale and they were only "rented" until needed – The two individuals were fundamentally part of the B.M. Metals organization and under the ultimate direction and control of B.M. Metals and accordingly employed by them – Certificates granted

B.M. METAL SERVICES INC.; RE ONTARIO PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA; OLRB File No. 0036-11-R; Dated October 18, 2012; Panel: David A. McKee (15 pages)

Collective Agreement – Interest Arbitration – Reference – The Minister of Labour referred a number of questions to the Board for its advice pursuant to section 115 of the Act – The Union gave the City notice to bargain for renewal of the expired collective agreement – The Union advised the City that it would rely on Article 15.1 of the collective agreement to submit remaining matters in dispute to arbitration if bargaining was unsuccessful – Article 15.1 stated that if, after bargaining in good faith for the agreement's renewal, either party may notify the other party in writing of its desire to submit the matters in dispute to arbitration if it becomes satisfied that an agreement cannot be reached – Further, Article 15.1 provided that the Minister must appoint a single arbitrator upon the request of either party if the parties cannot agree to an arbitrator within fourteen days – The City argued that Article 15.1 was not an agreement of the parties as required by section 40(1) of the Act; that the Act provided a complete code governing collective bargaining in Ontario; that the Act provided for interest arbitration only in the circumstances set out in section 40(1); and that any provision for interest arbitration in a collective agreement is not authorized by the Act, and is accordingly unenforceable – First, the Board advised that Article 15.1 did not constitute an agreement of the parties to arbitrate within the meaning of section 40 of the Act – In order to engage section 40(1), parties must give notice to bargain and then have to agree in writing to refer all matters remaining in dispute between them to an arbitrator – Thus, there was no impediment to the Minister appointing a conciliation officer – Second, the Board advised that courts do not consider the Act as a complete code such

that a collective agreement cannot include a dispute resolution mechanism other than those in the Act – Instead, the courts have found that the parties can agree to, or an interest arbitrator can order, the inclusion of an interest arbitration provision for the resolution of outstanding bargaining issues – Once a party has agreed to a dispute resolution mechanism, it cannot resile from that agreement, except perhaps on agreement or in the most extraordinary of circumstances – In this case, Article 15.1 would appear to be binding because the City agreed to it and it had not been removed through bargaining or by an interest arbitrator – Further, Article 15.1 did not affect the Minister's power to appoint a conciliation officer pursuant to section 18 of the Act – The Minister had the power to appoint an interest arbitrator when the parties failed to agree on one and nothing in Article 15.1 limited the Minister's authority in this regard – As such, where there has not been an agreement on a single arbitrator, and where the parties had agreed that either party could ask the Minister to make such an appointment, the Board advised the Minister that she had the power under the Act to appoint an interest arbitrator – Advice given to the Minister

THE CITY OF HAMILTON; RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1041; OLRB File No. 3881-11-M; Dated October 12, 2012; Panel: Gail Misra (27 pages)

Employment Standards – The Board dismissed the employee's application for review in which she sought amounts that were beyond those to which she was entitled under the ESA – The employer then sought costs after it prepared for a hearing in which it was entirely successful in a matter for which the employee had no prospect of success – The employer also made the necessary yet costly arrangements to appear after the employee refused to consent to an adjournment – The Board held it could not award costs because it did not have any legislative authority to do so – The ESA does not provide the Board with any authority to award costs, and although the SPPA provides this authority to tribunals where they have made specific Rules, the Board has not made any Rules related to costs – There are sound policy reasons for not awarding costs – The ESA is not meant to punish or deter an individual, who is often self-represented, unsophisticated, or vulnerable, from using the mechanisms provided for in the ESA – Further, any authority to award costs would most likely result in an increase in litigation – Accordingly, the employer's request was dismissed – Application for review dismissed

S. WILSON & CO. BAILIFFS LIMITED; RE GILDA DEL CASTILLO; RE DIRECTOR OF EMPLOYMENT STANDARDS; OLRB File No. 2749-11-ES; Dated October 2, 2012; Panel: Brian McLean (4 Pages)

Certification Where Act Contravened – Reconsideration – Remedies – Termination – The Board finds that a trade union seeking to rely on s. 11 relief predicated upon a contravention of the Act must at least file and deliver an application for certification if it expects to obtain a representation vote or remedial certification – Consistent with the scheme of the Act, the remedies available to the Board in subsection 11(2) are only available in circumstances where there is an application for certification – Matter continues

TOK TRANSIT LIMITED; RE TOK TRANSIT LIMITED, THE REGIONAL MUNICIPALITY OF YORK AND BILL FISCH; RE UNITED FOOD & COMMERCIAL WORKERS, LOCAL 206; RE AMALGAMATED TRANSIT UNION, LOCAL 113; OLRB File No. 3396-11-R, 3792-11-U and 3795-11-R; Dated October 31, 2012; Panel: Patrick Kelly (5 Pages)

Court Proceedings

Judicial Review – Sale of Business – The Board's decision found there was a sale of business based on an individual being a "key individual" in both the predecessor and new company – The parties agreed the standard of review was reasonableness – The Court found the Board identified the evidence it relied upon for its findings of fact and the line of reasoning that led from these findings of fact to its conclusion – The Court also found the Board's decision made it clear why it reached the conclusion it did and that it was within a range of reasonable outcomes – Accordingly the *Dunsmuir* test was satisfied – Application dismissed

ALLIANCE ENVIRONMENTAL AND ABATEMENT CONTRACTORS INC.; RE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES LOCAL 1891; RE ONTARIO LABOUR RELATIONS BOARD; OLRB File No. 0854-10-R (Court File No. 200/12); Dated October 15, 2012; Panel: Kiteley, Toscano and Ducharme JJ. (5 pages)

Employee – Judicial Review – The Board decision found that Human Resources Secretaries working for the applicant School Board were not employed in a confidential capacity in matters relating to labour relations nor exercising managerial functions and were therefore employees for the purposes of the Act – The Court found that the standard of review was

reasonableness (the Board was interpreting its home statute and applying it to the evidence), and it was a fact-driven exercise lying within the Board's expertise – The Court found that the Board reasonably concluded that the test for exclusion relating to labour relations matters requires a demonstration that the employee's work relates to matters affecting a union representing him or her and that it was reasonable for the Board to identify the mischief to which the legislation was directed as a conflict of loyalty – The Court found the Board's interpretation of s. 1(3)(b) to be reasonable and its application of this interpretation to the facts was consistent with the Board's jurisprudence and fully supported by the evidence before it – Concerning the managerial exemption the Board applied its longstanding test, and found consistent with the evidence that the secretaries did not make "effective recommendations" – The reasons, having met the test of transparency, intelligibility and justification, were reasonable – Application for judicial review dismissed

GREATER ESSEX COUNTY DISTRICT SCHOOL BOARD; RE CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 1348; RE ONTARIO LABOUR RELATIONS BOARD; OLRB File No. 1004-08-M (Court File No. 403/11); Dated October 3, 2012; Panel: Pardu, Swinton and Sloan JJ. (5 pages)

Apprehension of Bias – Duty of Fair Representation – Judicial Review –
The Applicant sought judicial review of a decision of the OLRB which dismissed the Applicant's complaint that the Algoma University Faculty Association had breached its duty of fair representation – The Board found that the Association properly evaluated the circumstances of the Applicant's grievances, and did not breach its duty of fair representation in responding to those complaints – The Court accepted that the standard of review for the Board's decision was reasonableness, and found that the Board's dismissal of the application was reasonable – The Board was not required to hold an oral hearing – It was the Applicant's responsibility to present the necessary facts to the Board in the complaint or reply – The Applicant alleged that the Board lacked impartiality, however, the fact that the Vice-Chair of the Board had decided another application of the Applicant did not demonstrate any partiality – The Court found no evidence that the Board failed to respect the language rights of the Applicant – Application dismissed

RENE GAGNE; RE THE ONTARIO LABOUR RELATIONS BOARD; RE ALGOMA UNIVERSITY FACULTY ASSOCIATION; OLRB File No. 0460-10-U (Court File No. 11-1764) Dated October 17, 2012; Panel: Roy, Swinton and R. Smith JJ. (3 pages)

Employment Standards – Judicial Review – The applicant sought judicial review of a Board decision in which the Board dismissed an application for review of an order to pay outstanding wages and vacation pay pursuant to the directors' liability provisions of the ESA – As a result of the applicant's failure to appear at the hearing, the Board treated his application as abandoned and confirmed the order to pay as made against him – At the judicial review hearing, the applicant argued he was denied procedural fairness because he was not able to address the amounts owing – He also argued the Board made mathematical errors in calculating the sum he was ordered to pay – The standard of review when the Board is interpreting the ESA is reasonableness – The Divisional Court found there was no procedural unfairness – Despite the applicant's effort to characterize the Board's actions as a denial of procedural fairness, he was in substance attacking the merits of the Board's decision to dismiss his application for review as abandoned – The Board's Rules of Procedure provide that where a person has received written notice of a hearing and fails to attend, the Board may decide an application without further notice to the person and without considering any documentation that the person may file at a later date – The applicant did not request an adjournment from the Board and the evidence showed that he knew how to contact the Board – In the circumstances, the Board reasonably proceeded in the applicant's absence – Application for judicial review dismissed

RICHARD HOTTA, A DIRECTOR OF PROTEUS CRAFTWORKS INC.; RE MAHAMMAD BADIUZZAMAN ET AL; RE ONTARIO LABOUR RELATIONS BOARD; OLRB File No. 1953-07-ES (Court File No. 613/10); Dated September 25, 2012; Panel: R.S.J. Brown, Matlow, and Swinton, JJ (3 Pages)

Employment Standards – Judicial Review – The applicant sought judicial review of a Board decision dismissing his appeal as untimely (six months after the order to pay was served) – The applicant had faxed a request to the Director of Employment Standards, rather than the Board, within 30 days advising he wished to file an appeal – The Court dismissed the claim that there was a breach of natural justice based on systemic bias, as there was no evidence on the record to support such a claim – The Court found the Board's decision that the appeal was untimely to be reasonable – The applicant had failed to file a timely application for review and failed to provide a reasonable explanation for his failure to do so, and the Board's application of these factors was reasonable – Application dismissed

SHAH ISLAM; RE J. ENNIS FABRICS LTD.; RE DIRECTOR OF EMPLOYMENT STANDARDS; RE ONTARIO LABOUR RELATIONS BOARD; OLRB File No. 1786-09-ES (Court File No. 506/10) Dated June 4, 2012; Panel: Jennings, Polowin and Wilton-Siegel JJ. (6 pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
Durval Terciera, et al Divisional Court No. 520/12	1475-11-U	Pending
Defence Contract Management Agency Americas (Canada) Divisional Court No. 513/12	0955-11-R	Pending
Bur-Met Construction Divisional Court No. DC-12-010 **Thunder Bay**	3893-11-R	Pending
Vito Tarantino Ltd. Divisional Court No. 363/12	0356-12-R	Pending
OSMWRC, et al Divisional Court No. 363/12	0784-05-G	Pending
2130869 Ontario Ltd. Divisional Court No. 359/12	3518-11-R and 3519-11-G	Pending
Albert Tsoi v. UNITE HERE Divisional Court No. 330/12	3908-09-U	Pending
Ontario Sheet Metal Workers' and Roofers' Conference, et al (Flynn) Divisional Court No. 325/12	2730-11-JD	Pending
IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	Pending
EllisDon Corporation Divisional Court No. 310/12	0784-05-G	Pending
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Thomas Fuller Construction et al Divisional Court No. 12-1832 **Ottawa**	1056-11-R	Week of Jan 28/13
Alliance Environmental Divisional Court No. 200/12	0854-10-R	Dismissed
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Landmart Building Corp. Divisional Court No. DC 12-346JR **Hamilton**	2519-11-R	Pending
Total Mechanical Systems Divisional Court No. 17/12	4053-10-R	Pending
Aragon (Hockley) Development (Ontario) Corporation Divisional Court No. 595/11	2781-09-R	Pending
C.W. Smith Crane Services v. IUOE Local 793 Divisional Court No. 513/11	3894–09–G	January 18, 2013
Swift Railroad Contractors Divisional Court No. 400/11	0039–06–U 0139–06–R	Registrar's dismissal
René Gagné v. Algoma University College Faculty Divisional Court No. 11–1764 **Ottawa**	0460–10–U	Dismissed
Greater Essex County District S.B. Court of Appeal No. M41822	1004–08–M	Seeking leave
John McCredie v. OLRB et al Divisional Court No. 1890/11 **London**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Pending

Case name & Court File No.	Board File No.	Status
Dean Warren v. National Hockey League Divisional Court No. 587/10	2473–08–U	December 7, 2012
Richard Hotta (Proteus Craftworks) v. Mahamad Badiuzzaman, et al Divisional Court No. 613/10	1953–07–ES	Dismissed
Mr. Shah Islam v. J. Ennis Fabrics Divisional Court No. 506/10	1786–09–ES	Dismissed
Greater Essex Catholic District S.B. Supreme Court No. 34992	3122–04–G	Seeking leave to SCC
John McKenney v. Upper Canada District S.B. Court of Appeal No. M41065 **Ottawa**	2687–08–U	Application for leave, Dismissed
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	Pending
Independent Electricity System Operator v. Canadian Union of Skilled Workers, LIUNA et al Supreme Court No. 34915	3322–03–R 2118–04–R	Seeking leave to appeal to SCC
Pro Pipe Construction v. Norfab Metal and Machine Divisional Court No. 408/09	2574–04–R	Pending
Blue Mountain Resorts v. MOL Court of Appeal No. C54427	1048–07–HS 0255–08–HS	September 27, 2012 Heard, reserved
Roy Murad v. Les Aliments Mia Foods Divisional Court No. 291/09	1999–07–ES	Pending
Greater Essex County District School Board v. IBEW, Local 773 et al Court of Appeal No. C55503	1776–04–R et al	November 8, 2012
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	Pending

Ontario Labour Relations Board

505 University Avenue
2nd Floor
Toronto, Ontario M5G 2P1
Telephone: 416-326-7500
Facsimile: 416-326-7531

Commission des relations de travail de l'Ontario

505, avenue University
2e étage
Toronto (Ontario) M5G 2P1
Téléphone: 416-326-7500
Télécopieur: 416-326-7531

Ontario

November 5th, 2012

NOTICE TO THE COMMUNITY

Please be advised that the Ontario Labour Relations Board will neither schedule nor hold hearings between **December 24, 2012 and January 4, 2013** inclusive. Matters of an urgent nature, however, may be scheduled on an expedited basis as determined by the Board, during this period. Applications will be processed in the usual manner on the dates that the Board is open for business, including: December 24, 27, 28, and 31 2012 and January 2, 3 and 4 2013.

Please note the default dates and hearing schedule for s. 133 grievance referrals over the holiday season.

Thank you for your attention to the above. Please have a safe and very happy Holiday Season.

DATE REFERRAL FILED	HEARING DATE
December 10 , 2012	January 7, 2013
December 11	January 7
December 12	January 8
December 13	January 8
December 14	January 9
December 17	January 9
December 18	January 10
December 19	January 10
December 20	January 11
December 21	January 11
December 24	January 14
December 27	January 14
December 28	January 15
December 31	January 15
January 2, 2013	January 16
January 3	January 17
January 4	January 18

Peter Gallus
Director/Registrar